No. 8981

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. H. SMITH, D. N. McBRIER, F. B. McBRIER, ALICE M. BETHEL, CHARLES A. OWEN, MORRIS K. RODMAN and ETHEL W. JOHNSTON, for themselves and others similarly situated, *Appellants,*

vs.

BOISE CITY, a Municipal Corporation, and THOMAS F. RODGERS, as City Treasurer of said Boise City, *Appellees.*

APPELLANTS' PETITION FOR REHEARING

On Appeal from District Court of the United States for District of Idaho, Southern Division

RICHARDS & HAGA,
Attorneys for Appellants,
Residence: Boise, Idaho.

STRAWN & CO. INC. STATIONERS-PRINTERS, BOISE

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Your petitioners, E. H. Smith, D. N. McBrier, F. B. McBrier, Alice M. Bethel, Charles A. Owen, Morris K. Rodman and Ethel W. Johnston, appellants in the above cause, respectfully petition this Honorable Court to grant a rehearing in said cause, and, as a basis for such petition, your petitioners respectfully show:

Error No. 1

That the court erred in holding that there was no trusteeship on the part of Boise City, except as to the

money actually received by the officers of said City from collections made for the payment of your petitioners' bonds; that as to all duties imposed by law upon the City for the levying and collection of the assessments, its officers were merely special agents or instrumentalities acting, not for the City, but for and on behalf of your petitioners and other bondholders, and that Boise City is not liable for the negligence or failure of its officers in failing to perform the acts which the law requires that they shall perform in connection with the levying and collection of assessments for the payment of your petitioners' bonds.

Argument:

We believe the court's decision as to the trusteeship of the City is too narrow and is not a correct interpretation of the Idaho statutes and state decisions, and conflicts with the decisions of other federal circuit courts of appeals and the highest courts of other states having statutes similar to the Idaho statutes here involved.

The decision is apparently based on the decision of this court in Moore v. Nampa, 18 Fed. (2d) 860, which in turn was based on dicta in the decision of the Idaho Supreme Court in Broad v. City of Moscow, 15 Ida. 606, 99 Pac. 101. The material provisions of that decision rested wholly upon a statute which has long since been repealed. Under that statute, improvement districts and contracts for improvements were handled by a sewer committee of "three substantial tax-

payers and bona fide residents of such city, town or village, who shall be styled collectively the 'Sewer Committee'." That statute provided that a "sewer committee", composed of taxpayers who were not officers of the city but represented those interested in the improvement district, either as landowners or as contractors or bondholders, should be in effect the governing body of the improvement district.

It was the acts of the sewer committee which the court in the Moscow case said were not binding upon the city. The statute provided that the chairman of that committee should execute all written contracts and sign all orders for the payment of money authorized by the statutes. The court says (p. 619):

> "Under this act the contract for sewerage improvement is made with the sewerage committee, appointed under the provisions of this act and the ordinances creating such sewer district. It is not an obligation or contract of the city."

The controversy in that case arose out of the fact that the improvement bonds were not delivered at the time the contractor was entitled to payment, and the bonds bore interest from a much later date. In the course of time the contractor sued the city for the loss of interest during the period between the time he should have received the bonds, or payment for his work, and the time he did receive the bonds. The contractor accepted the bonds and later sued the city for

the loss of interest during the interim. The contract between the contractor and the sewer committee expressly provided (p. 620) that the city in whose name the contract was made by the sewer committee "is but an agent between the owner of the property to be assessed for said improvement and the second party, and that said first party shall not be liable, except as provided by law, for said assessment fund or for any claims or demands whatever against said fund, except as trustee thereof. * * * "

After referring to the contract, the court further says (p. 620):

> "From this provision of the contract we perceive that the parties looked upon the contract as being made for the district, and clearly stipulated that the city was to act only as agent for the distribution and payment of the fund arising from the special assessment made against the property affected by such sewerage works."

Again the court says (p. 623):

> "If, then, the city of Moscow failed to pay the plaintiff at the completion of his contract, and failed to deliver him the bonds which were his due under the terms of his contract, his remedy was against the officers to compel them to perform their duty; that is, to pay him his due and deliver to him the bonds he was entitled to under his contract."

In other words, the contractor was entitled to his money on the completion of the contract, or to bonds bearing interest from that date. After some delay he received bonds for the face amount of his contract, but they bore interest from a date about a year later than the contract stipulated. The court, in effect, held that instead of accepting the bonds thus offered, he should have compelled the sewer committee by mandate, if necessary, to deliver to him the kind of bonds he was entitled to under his contract, and, not having done so, he had no cause of action against the city for damages.

Our construction of Broad v. Moscow, *supra,* is confirmed by the recent decision of the Idaho Supreme Court in Cruzen v. Boise City, 58 Ida. 406, 74 Pac. (2d) 1037, referring to the earlier decision, the court says (p. 414):

> "Broad v. City of Moscow, 15 Ida. 606, 99 Pac. 101, relied upon by the appellant, is not in point as *it involved only the delivery of bonds to a contractor after completing his contract and had nothing to do with payment or collection of assessments by the city.*
>
> "While there are authorities to the contrary, the better reasoned rule as applied to this statute (meaning the statute here in question) supports the judgment." (Citing authorities.) (Our italics.)

The court in the Cruzen case quotes the statute (Sec. 49-2728) set out in the bonds, with emphasis on the exception (p. 411):

> "The holder of any bond issued under the authority of this Article shall have no claim therefor against the municipality by which the same is issued, in any event, *except for the collection of the special assessments made* for the improvement for which said bond was issued, but his remedy, in case of non-payment, shall be confined to the enforcement of such assessments * * * ." (The court's emphasis.)

The court then adds:

> "In other words, respondents recognize that in so far as the *initial security* is concerned, no claim could be made against the city, only against the property in the district, and this is correct, but respondents urge the statute recognizes *that the city is liable for the collection of the assessments* and that the general rule applicable to a private trust would apply, resulting in the responsibility of the trustee for the defalcation of his agent." (Our italics.) And the court held with respondent.

Obviously, the court meant by the expression that the city is liable for the *collection* of the assessments, something more than merely the *disbursement* of the money *after its collection*. The court clearly meant

that the city would be liable for such losses as would result to the fund or to the bondholders because of the negligence or failure of the city to proceed with the levy and collection of the assessments in the manner required by law and so that a valid tax lien would be acquired on behalf of the bondholders against the property liable for the improvements. That is evident from what the court further says (pp. 412-413):

> "The bondholder has no control of the municipal agents and unless protected by liability on the part of the city which selects and does control its agents, would be without any redress whatever. The statute evidently recognized this by making the above noted exception. *As generally supporting liability on the part of the city herein see Henning v. City of Casper, (Wyo.) 57 Pac. (2d) 1264.*" (Our italics.)

We are accordingly referred by the Idaho Supreme Court for the law on the subject of the liability of the city, to Henning v. City of Casper, 57 Pac. (2d) 1264. In that case it appeared that assessments had been levied by the city authorities for a number of years under a statute which was not applicable to the improvements for which the assessments were levied, and the assessments which had been levied were illegal and void under the laws of the State of Wyoming and did not constitute a lien against the property liable for the improvements. There was no way that the negligence or neglect of the city authorities could be cor-

rected and the loss would have to fall either upon the bondholders or upon the city. The bondholders had attempted to foreclose the liens and when the property owners set up the illegality of the assessments, the bondholders had notified the city authorities of the pendency of the foreclosure actions and requested that the city appear and defend the validity of the assessment liens and that the city would be held liable if the court should declare the assessment liens to be illegal and invalid, but the city had refused, failed and neglected to appear or participate in the foreclosure actions and the liens having been held invalid, the bondholders then brought an action against the city for the loss resulting from the void assessments.

The court, after referring to the law as between individuals, says (p. 1268):

> "Principles of justice and honesty fundamentally apply to individuals, municipalities, states, and Nation alike, and should be applied alike, unless constitutional or statutory provisions forbid. Municipalities, it is true, are creatures of the Legislature and have only such powers as are granted them, and cannot do the things prohibited by law, as we held in the first part of Tobin v. Town Council, 45 Wy. 219, 17 P. (2d) 666, 84 A.L.R. 902. But courts ought not, and will not, according to the weight of authority, go too far in brushing aside principles of justice and honesty, and this fact was recognized by us in the second

part of Tobin v. Town Council, supra. To give cities to understand that if they can get some one to buy worthless bonds, the purchaser may go and find his money where he can, and that upon them or their officers rests no duty whatever, does not sound like a salutary rule. Of course, if the city and its officials fulfill their duty in connection with special assessments, nothing further can be expected of them; the contract between the parties, or the statute limiting liability, must then govern, and the city is relieved from any liability, even though there may be a deficiency in the amount collectible. (Citing many authorities) But when there is a failure, neglect, or refusal to perform such duty, a different question is presented.

* * * *

"It may be noted that the latter statute is copied verbatim in the bonds in controversy. It would seem clear that the sections quoted contemplate the existence of assessments from which the bonds may be paid. Surely the Legislature did not intend to confine the bondholder 'to the enforcement of such assessments,' unless the latter existed. And it provided for their existence by mandatory provisions. Moreover, the duty of the city to create them is implied, (Citing many authorities), and the further duty is implied that the assessments shall be valid. (Citing many au-

> thorities) The assessments so far made herein have been declared void, and the duty of the city and its officials, accordingly, has not been fulfilled. * * *"

The Wyoming court reviews the authorities, citing many cases from state and federal courts, including the case of Broad v. City of Moscow, 15 Ida. 606, and says (p. 1272):

> "In cases cited from Indiana, Alabama, and Idaho, the courts hold that the city authorities are the agents of the contractor or bondholder in connection with the levy and collection of assessments. We think, however, that this view is erroneous, and we agree in that respect with Dillon, supra, page 1257."

In referring to Broad v. City of Moscow the court evidently had in mind the generality of the statements in that decision and not the special or peculiar facts on which the decision was based. Much of what was said in Broad v. Moscow is now recognized as dicta and this is clearly shown by the recent decision in Cruzen v. Boise City, 58 Ida. 406, which, in effect, limits the application of the former decision to the old statute providing for the sewer committee. The Idaho court, in the Cruzen case, was content to refer to Henning v. City of Casper for a correct statement of the law on the liability of the city for losses sustained by bondholders from the negligence of its officers.

It should also be noted that the decision in Broad v. Moscow was controlled to a great degree by the *contract* made by the sewer committee for the construction of the sewer. The court repeatedly refers to the provisions of that contract wherein the contractor waived all claim against the city and agreed to accept payment in cash, or bonds as stipulated in the contract. The Idaho court quotes in support of its decision from other authorities based on similar contracts.

An examination of the authorities will show that in the earlier statutes in Idaho and other states the improvement district was considered as a quasi-political entity, separate and distinct from the city government. Decisions based on such statutes are not in point.

This court bases its decision in the instant case to a large degree upon its earlier decision in Moore v. City of Nampa, 18 Fed (2) 860. We submit, however, that that case is not in point. We admit that this court said in that case that,

> "Where there is no liability against the corporation, the corporation authorities do not act as its representatives, but as special agents or instrumentalities to accomplish a public end."

That statement was based presumably on the Moscow case but it was no more pertinent in the Nampa case than in the Moscow case. That question was not involved in either case. That seems clear from the decision of the Supreme Court of the United States

in Moore v. Nampa, 276 U. S. 536, 72 L. ed. 688. An examination of that decision will show that while the Supreme Court affirmed the decision of this court it did not do so on the reasoning or on the grounds set out in the opinion of this court.

We think it is clear from the decision of the Supreme Court that it did not approve the broad rule stated by this court and quoted above. On the contrary, the Supreme Court indicated by many expressions in its decision that the bondholders would have had a cause of action against the city for damages resulting from the negligence or failure of the city officials to perform the duties imposed upon them by the statutes for the levy of assessments and the collection of the taxes and the disbursement of the funds.

In the Nampa case the original engineer's estimate on the cost of the improvement was $118,300.00 and bonds were authorized and issued for $117,000.00 under an ordinance adopted December 6, 1920. The validity of the bonds thus authorized was not in issue. It was later found that the estimate was too low, and without any other engineer's estimate the city authorities passed an ordinance on January 10, 1921, reciting in substance that the cost would be in excess of the engineer's estimate and authorized the issuance of additional bonds to the amount of $43,000.00. The validity of the second issue was the only question before the court, and the attack on that issue was based on the fact that there was no engineer's estimate on

which assessments for the payment of the second issue could be based. The Idaho Supreme Court had held that no contract for the construction of a sewer could be let for an amount in excess of the engineer's estimate. (Lucas v. City of Nampa, 41 Ida. 35, 238 Pac. 288.)

Following that decision, Moore brought an action in tort to recover from the city on the ground that the bonds were purchased because of the recitals in the bonds and certificates of the city officials that the statute had been complied with and that no litigation was pending affecting the validity of the bonds. It will thus be seen that the question involved was the liability of the City of Nampa for a false or erroneous certificate which its city officials made before the bonds were sold. The Supreme Court says (p. 540):

> "He insists that respondent was negligent in failing to have a proper estimate and valid assessments made and in causing the false certificate to be issued, and that the damages claimed were caused by negligence and misrepresentation. The suit is for tort. The demurrer was rightly sustained, unless the complaint shows that a breach by respondent of some duty it owed petitioner caused the damage claimed."

The court then refers to the fact that Moore, when he purchased the bonds, was charged with knowledge of the actual record as it then stood, and with knowledge of the provisions of the statutes that bonds could

not be issued in excess of the engineer's estimate, and that the false certificates were made prior to his purchase of the bonds. The court then says (p. 541):

> "The bonds were void, as held in the Lucas Case, because issued upon assessments made in excess of the engineer's estimate. On the facts disclosed by the complaint, actionable negligence cannot be predicated on the failure of respondent's officers properly to exert their powers and perform their duties in respect of the estimate, assessment and contract for construction of the sewer. Such failure was not a breach of duty owed by respondent to petitioner. He had no relation to the matter until long after the bonds had been issued and sold to another. The facts showing their invalidity were disclosed by the transcript and known to the attorneys on whom he relied long before he purchased them. The complaint is not grounded on anything subsequently occurring.
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> * * * *
>
> " * * * No law required or authorized the making of any certificate. The statutes do not contemplate any such statement. It is not a part of or material to the prescribed proceedings. The city council is the governing body of the city, but it did not make or authorize the statement. * * *
>
> "This action is not based on contract. * * *"

The decision of the Supreme Court of the United

States in Moore v. Nampa has never been considered as supporting the contention that the city will not be liable for the negligence and default of its officers in performing the duties which the statute imposes upon them relative to levying, collecting and certifying the special assessments out of which improvement bonds must be paid. One of the recent and well considered cases on the subject is that of the City of McLaughlin v. Turgeon (C.C. 8), 75 Fed. (2d) 402. There as here a city official had failed to properly perform his duties and the city was held liable for the loss resulting from his default or negligence. The court refers to the decision of the Supreme Court in Moore v. Nampa and to a case from the Tenth Circuit and adds:

> "But these authorities are not in conflict with the views here expressed. In Moore v. City of Nampa, supra, action was brought to recover damages alleged to have been suffered by reason of defendant's negligence and false representations in respect to certain improvement bonds. * * * The suit was for tort, and the court held that the facts showing the invalidity of the bonds were disclosed by the public record of the proceedings and known to plaintiff's attorneys, upon whom plaintiff relied before purchasing the bonds."

After reviewing the authorities, the court further says (p. 407):

"These cases clearly establish the rule that, *where the city has disabled itself from making or collecting an assessment, the city will be primarily liable.* * * * As before said the city was not in the first instance primarily liable for the cost of these improvements, and the question is whether it has been liable because of its breach of duty in enforcing the liability against the property as contemplated by the improvement scheme and the contract thereunder.

"It is to be observed that this statute specifically confers on the municipality the power to collect special assessments for local improvements. * * * The contract, being a valid one, imposed the duty upon the city to make the collection of the special assessment in the manner provided by law. * * * True, the law contemplates that the duty of the city in this regard shall be performed through a certain specified agency, to wit, the city auditor. * * * (p. 410) *The city, having with authority contracted to collect the special assessment in the manner provided by law, and having negligently failed to follow the statutory provisions with reference to collection of such assessments,* committed a breach of its contract, and this action is properly brought for damages for breach of contract. * * * *The plaintiff was not required to resort to mandamus.* * * * The measure of his damage being the contract price, or, in this case, the amount

due on the bonds, as held by the lower court. (Our italics)

The Circuit Court of Appeals for the Tenth Circuit, in Brown-Crummer Inv. Co. v. Paulter, 70 Fed. (2) 184, sustained the right of the bondholders to the penalties which had been remitted under an act passed *after* the bonds were issued, and to the same effect is the decision of the Supreme Court of Oklahoma, in Straughn v. Berry, 65 Pac. (2d) 1203.

The court in its decision in the instant case holds that the icty was not trustee for the bondholders except only as to the fund in its possession from the collection of taxes. Limiting the obligation of the city as thus interpreted is presumably due to what we consider the erroneous application of the decision of the Idaho Supreme Court in Broad v. Moscow, 15 Ida. 606, 99 Pac. 101. We again call attention to the recent decision in Cruzen v. Boise City, 58 Ida. 406, 74 Pac. (2d) 1037, wherein the court does not limit the obligation of the city as trustee, but emphasizes the exception contained in Sec. 49-2728, which exonerates the city from liability for special improvements, "*except for the collection of the special assessments made for the improvement for which said bond was issued.*"

Obviously the word "collection" as used in this statute embraces more than merely the disbursement of the funds after they have been collected. The collection of the assessment clearly includes the do-

ing of all things required under the statute in connection with the levying and certifying of the special assessment to the county authorities so that they may be collected by the county treasurer.

The word "trustee" is defined in 65 Corpus Juris, p. 215, as follows:

> "In a broad sense a trustee is defined to be a person in whom some estate, interest or power in or affecting property of any description is vested for the benefit of another."

Bouvier's Law Dictionary defines it as

> "A personal obligation for paying, delivering, or performing anything where the person trusting has no real right or security, for by that act he confides altogether to the faithfulness of those intrusted."

Black's Law Dictionary defines it as

> "An equitable obligation, either express or implied, resting upon a person by reason of a confidence reposed in him, to apply or deal with the property for the benefit of some other person, or for the benefit of himself and another or others according to such confidence."

To the same effect is Templeton v. Bockler, 73 Ore. 494, 144 Pac. 405, 409, and the Restatement of the Law of Trusts and Trustees, Sec. 1.

The Idaho statutes contain a complete code cover-

ing special improvements, the letting of contracts, the determination of the benefits that will be derived from such improvements by the several pieces and lots embraced in the improvement district and for the issuance and payment of the bonds. These statutes require that the assessment roll be prepared and filed before any improvement bonds can be issued. The assessments so made constitute a lien against each piece for the amount shown on the assessment roll. The lien thus created is for the equal and pro rata benefit of each bond and constitutes the security for the payment of all bonds.

The city, under Sec. 49-2719, (set out in the appendix of our original brief), is required to levy annually a special assessment sufficient to redeem the instalment of the bonds maturing next thereafter. The levying of such annual assessments, the giving of notice to the taxpayers of the time of payment; imposing the penalties for default in payment, and certifying the delinquent assessments to the county treasurer for collection are obligations which the statute places upon the city and which necessarily must be performed by the city officers to whom that particular function has been delegated by law or city ordinance.

The statutes vests in the city control over the bondholders security. From the time the city issues the bonds until the last bond is redeemed, the city is a trustee for the bondholders. As such trustee it makes

the annual assessments; it causes notices to be issued for the payment of taxes; it imposes the penalties for default in payment; it certifies the delinquent taxes to the county treasurer for collections, and it disburses the money, whether collected by the city clerk before default is made by the taxpayer or whether collected by the county treasurer after the tax becomes delinquent.

We can see no logical basis and no sound reason for saying that the city becomes trustee only when the money is paid to its officers, and that as to the handling of the security and the collection of the assessments it is merely the bondholder's agent. Clearly, the city occupies the same relation to the bondholders' security as does the private trustee under a bond issue. One has control over the security substantially to the same degree and extent as the other. The city operates under an obligation imposed by statute; a private trustee operates under an obligation imposed by a trust deed or mortgage securing the bonds. In each case there is a trust estate which constitutes the security for the bonds. In each case the trustee has obligations to perform in the matter of collecting the payments due the bondholders.

This court suggests in its opinion that the bondholders have the right to foreclose their lien if the taxes become delinquent. That right is but an illusion. It is impossible of enforcement for the reasons shown in our original brief, pp. 51 and 52. We think there is

no answer to our argument on that point. The state and federal courts have repeatedly held that where the city authorities have failed to make a valid levy and cannot make a re-assessment to protect the bondholders' rights, then the city is liable for the loss.

City of McLaughlin, S. D., v. Turgeon (C.C. A. 8) 75 F. (2d) 402, 406, 407;

Henning v. City of Casper, 51 Wyo. 1, 57 Pac. (2d) 12611;

Powell v. City of Ada (C.C.A. 10) 61 F. (2d) 283, 286;

Barber Asphalt Paving Co. v. City of Denver C.C.A. 8) 72 F. 336, 339;

Denny v. City of Spokane (C.C.A. 9) 79 F. 719;

Bates County, Missouri, v. Willis (C.C.A. 8) 239 F. 785, 792;

District of Columbia v. Lyon, 161 U.S. 200, 16 S. Ct. 450, 40 L. Ed. 670;

Grand Lodge, A.O.U.W., v. City of Bottineau, 58 N.D. 740, 227, N.W. 363, 368;

Weston v. City of Syracuse, 158 N.Y. 274, 53 N.E. 12, 15, 43 L.R.A. 678, 70 Am. St. Rep. 472;

Freese v. City of Pierre, 37 S.D. 433, 158 N.W. 1013, 1016;

Coolsaet v. City of Veblen, 55 S.D. 485, 226 N.W. 726, 728, 67 A.L.R. 1499;

Price v. City of Scranton, 321 Pa. 504, 184 A. 253, 254.

Under the decision of this court, holders of improvement bonds are the orphans of the law. The city, under that decision, may with perfect immunity and impunity disregard all the obligations imposed on it by law for the protection of the bondholders, except to disburse the fund if a taxpayer sees fit to voluntarily pay his assessments.

We submit that the Idaho statutes do not justify that conclusion. The statutes contemplate that those receiving the special benefits from an improvement are primarily liable for the payment of the improvement; that the property within the improvement district constitutes the bondholders' security; that a bondholder purchases his bond upon the strength of that security and upon the obligation imposed upon the city by law to levy the assessments according to law and enforce all the remedies available to the city authorities for the benefit of the bondholders. The bonds are sold upon that understanding and if that be not the law, then improvement bonds should not be sold to the public.

To a very large degree public improvements are now made through the sale of special improvement bonds. Sound public policy demands that the city be required to perform the duty imposed on it by law for the collection of the assessments and the protection of the bondholders.

We refer again to the latest expression of the Supreme Court of the State of Idaho on this subject. That court, in Cruzen v. Boise City, 58 Ida. 406, 74 Pac. (2d) 1037, referred to the fact that the bondholder had no control over the municipal agents and that he would be without protection if the city were not liable for its neglect in the performance of its statutory duties that may result in loss to the bondholders. It referred to the case of Henning v. City of Casper, (Wyo.) 57 Pac. (2d) 1264, for a statement of the law as to the liability of the city, and we have already quoted from that decision.

Error No. 2

The court erred in holding and deciding that if the officers of Boise City neglected to levy the assessments or pursue the procedure provided by law for the levying and collection of such assessments, the only remedy available to your petitioners and other bondholders was to compel such officers by mandate to perform the duties in the manner required by law.

Argument:

The above doctrine, which apparently largely influenced the decision of the court, is based upon what we consider the same erroneous rule that we have discussed under Error No. 1, and which, in brief, is based on the theory that the city has no legal responsibiilty in carrying out the provisions of the statute

for the assessment and collection of the assessments and the disbursements of the funds, except where the money is misappropriated by an officer of the city and wongfully diverted to his use, as in the case of the embezzlemnt by the city clerk, in which case the bondholder may have relief in an ordinary action for damages.

It will be noted from the decisions which support the right of bondholders to recover damages for negligence or neglect of duty by the city officers, that in those cases the court did not invoke the rule that the bondholders should have been continuously on guard to see that a wrongful act was not about to be committed, or a duty about to be neglected. We think the doctrine is unsound that the bondholders must stand watch over city officers and resort to a writ of mandate in order to protect their rights.

In the Cruzen case the Idaho Supreme Court held clearly that the city was liable for the embezzlement of funds by the city clerk, notwithstanding the bondholder had not sought by writ of mandate to compel the clerk to pay the money to the bondholders instead of appropriating it to her own use. There would seem to be no logical basis for requiring the bondholders to resort to writs of mandate for the protection of their rights in other cases where the application for the writ would necessarily have to be made after the time has expired within which the officer must perform his duty.

The law fixes a time within which the assessments shall be levied, the collections made by the clerk, and the delinquent assessments certified to the county treasurer. Unless the officer proclaims in advance that he will not perform his duties, the bondholders cannot obtain relief through the court until after the time has expired for the doing of the act that the officer has failed to do. In paying certain bondholders more than their pro rata share, it would be too late to apply for the writ of mandate after the payment has been made. We submit therefore that the doctrine is not sound, that the bondholders must apply for a writ of mandate for the enforcement of their rights, and that the city is not liable for the damages sustained, except in the one case where the funds are misapprpriated.

Error No. 3

That the court erred, (a) in holding and deciding that it would be inequitable to hold the city liable for paying to the bondholders, whose bonds had been paid in full, more than their pro rata share of the total fund available for the payment of the bonds issued, and (b) in denying petitioners the right to recover from the city for wrongfully paying certain bondholders more than their pro rata share.

Argument:

That part of the court's decision which denies petitioners the right to recover from the city the

loss which petitioners will sustain because the city paid to certain bondholders more than their pro rata share, apparently rests on the doctrine that petitioners should have, by writ of mandate or injunction, protected their rights when the city was making disbursements and redeeming the bonds bearing lower numbers.

Again, we submit that public policy throws upon the city and its officers the obligation of performing the duties according to law, and the responsibility to see that that is done should not by the court be shifted to the bondholders. Surely, there should be some inducement for public officers to perform their duties according to law, and that inducement is the liability their city will incur if they fail to do so. The rule followed by this court throws all responsibility upon the bondholders and removes all liability from public officers if they negligently or carelessly perform or fail to perform the duties specifically imposed upon them by the statute.

Perhaps there was a time when bondholders resided in the community where the improvements were made, and could conveniently keep in touch with the community's affairs, but that period has long since passed. It is a matter of common knowledge that the money for needed public improvements of the character here involved is obtained from bondholders scattered throughout the United States and even in foreign countries. The Legislature clearly had no intention of impairing the sale of the bonds and preventing the

obtaining of needed money for public improvements by throwing upon the bondholders a burden such as is suggested by the decision in this case.

The doctrine on which this court bases its decision makes it an inducement for the city officials to neglect their duties and obligations to the bondholders, for by so doing they will favor the local taxpayers and relieve them of the burden of paying for public improvements.

The theory of the statutes obviously is that the purchaser will inform himself as to the value of the security, and having found that satisfactory, he may proceed on the assumption that the city authorities will faithfully perform the duties imposed upon them by law, and that the city which appoints the public officials to perform such duties will be responsible for their negligence and carelessness and suffer the loss that will result if they fail to properly perform their duties.

The bond (Exhibit A to the complaint, R. 25-28) does not show the amount of bonds that were issued, and there was no occasion for a bondholder who received his interest, to keep a watchful eye over the conduct of the city officials before his bond matured. The excess payments to bondholders were made before the bonds now before the court matured, and such payments were made, as shown by our original brief, pages 42 to 51, at times and under conditions that should have apprised the public authorities charged with the responsibility of disbursing the funds that

the improvement district fund was insolvent. The delinquencies in the tax collections from the very beginning were such as to clearly show that the property could not be sold for sufficient to pay the general taxes and the special improvement assessments. That a serious loss or deficit would result, was apparent to all local officers responsible for handling the collections and disbursements.

Error No. 4

That the court erred in holding and deciding that the record in this case did not contain all the evidence before the trial court and that this court had only a partial record before it, and therefore could not hold that Boise City as trustee for the bondholders had failed to sustain the burden of proof that was cast upon it in its accounting as such trustee.

Argument:

We believe the court overlooked a number of statements in the record which we think show clearly that the record before it includes all the evidence admitted by the trial court, except the original bonds owned by your petitioners and a copy of the bond is attached to the complaint as an exhibit. It must be remembered that the city at all times contended it could not make a complete report because of the condition of its records. The reports which it made under the order of the court were qualified by the statement that the in-

formation submitted was based upon "the audit of Lybrand, Ross Brothers & Montgomery." (R. 81-82, 84.) In the supplemental report filed by the City it is stated that, *"the accounting which follows contains all of the information in the hands of Boise City,* of the property included" in the District, etc. (R. 87); and in the second supplemental report it is stated: *"With the matters furnished herein, Boise City has furnished all of the facts pertaining to said Local Sidewalk & Curb Improvement District No. 38 that it is possible for it to furnish."* The reports so furnished by the City are set out with all the fullness that the rules of the court would permit in a record on appeal. The trustee says that its records are in such condition that it cannot furnish more information. Surely that does not shift the burden of proof.

It is true that the record does not contain the complete audit of Lybrand, Ross Brothers & Montgomery, for that covers *all districts and the general fund of the City.* The court refused to admit that audit in evidence, except for the sole purpose of checking the excerpts therefrom that pertained to Local Sidewalk & Curb Improvement District No. 38 (R. 67). The record recites that the audit "was admitted for the purpose of showing the connection and pertinency of certain excerpts from such report, which counsel stated he proposed to offer in evidence, and which he said were particularly pertinent to the issues in the case. *The audit was received for that purpose."* The record

then contains the excerpts from the audit pertaining to District No. 38. (R. 67-78.)

We think that the fair construction of the record justifies the statement that it contains all that part of the audit which pertains to the District here involved, and all the evidence that was admitted by the trial court as having any bearing upon the issues before it.

On page 95 of the record there is set out the prayer for the settlement of the "Statement of the Evidence" on appeal and it will be noted that counsel for appellant prayed that the statement *"be settled, approved and allowed by the court as a true, full, correct and complete statement of all the evidence taken and given on the trial of said cause."* Following that prayer is the order of the court which recites that after hearing counsel for the respective parties as to the matters that should be included in the statement, "the foregoing statement is settled as *a true, complete and properly prepared statement under Equity Rule No. 75.*" (Our italics.)

In view of the above we respectfully submit that the court is not justified in saying:

> "We have not before us all of the evidence taken before the trial court. In the absence of such evidence, we are not in a position to say that the trustee failed to sustain the burden of proof that that was the entire amount received by it, or that the trial court was in error in finding the

amounts received and disbursed by the city on account of the improvement district in question."

The doctrine of this case affects all cities in Idaho that have issued improvement bonds, and all holders of such bonds. It may well reach beyond the borders of the state. We think under the circumstances that further consideration should be given to the questions presented by the errors assigned.

Wherefore we respectfully pray that a rehearing be granted.

Respectfully submitted,

RICHARDS & HAGA,
OLIVER O. HAGA,
Attorneys for Petitioners.

State of Idaho, }
County of Ada, } ss.

I, Oliver O. Haga, of counsel for petitioners above named, *Do Hereby Certify,* that in my opinion the foregoing petition is well founded and that it is not interposed for delay.

OLIVER O. HAGA,
Of Counsel for Petitioners.

Dated July 24, 1939.